IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.08.2007

C O R A M :

THE HONOURABLE MR.A.P.SHAH, THE CHIEF JUSTICE
AND
THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

W.P.Nos. 45294 of 2002 and 40902 to 40904 of 2005
and M.P. Nos. 43903 to 43905 of 2005

W.P.No. 45294 of 2002

Madurai Power Corporation (Pvt) Limited
Flat G-1, No.1 Seshadri Road, Alwarpet
Chennai-18.

... Petitioner

-vs-

1. The Deputy Commissioner of Central Excise
Bibikulam, Madurai I Division, Madurai-625 002.

2. The Commissioner of Central Excise
Bibikulam, Madurai-625 002.

3. The Chief Commissioner of Central Excise
6/7, ATD Street, Race Course Road,
Coimbatore 641 018.

4. Government of Tamil Nadu represented
by Secretary to Government,
Energy Department, Fort St. George,
Chennai-9.

5. Tamil Nadu Electricity Board represented
by its Chairman, 800, Anna Salai,
Chennai-2.

... Respondents

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W.P.No.40902 of 2005

Samalpatti Power Company (P) Limited
"Sreyas Virat" 1st floor,
No.14, Third Cross Road, Raja Annamalaipuram,
Chennai-28 represented by its Chief Financial Officer
and Company Secretary Mr.K.S.Kasturirangan

.. Petitioner

vs

1. Union of India represented by Ministry
of Finance, Department of Revenue,
North Block, New Delhi.

2. The Assistant Commissioner of Central Excise
Hosur I Division, No.29, Thalli Road,
Hosur-635 126.

3. The Additional Director General
Directorate General of Central Excise Intelligence
South Zonal Unit, C-3,"C" Wing Rajaji Bhavan
Besant Nagar, Chennai-90.

4. The Commissioner of Central Excise
Chennai III Commissionerate
26/1 (121) Mahatma Gandhi Road
Nungambakkam, Chennai-34.

5. The Chief Commissioner of Central Excise
Chennai III Commissionerate
26/1 (121) Mahatma Gandhi Road
Nungambakkam, Chennai-34.

6. Government of Tamil Nadu represented
by Secretary to Government,
Energy Department, Fort St. George,
Chennai-9.

7. Tamil Nadu Electricity Board represented
by its Chairman, 800, Anna Salai,
Chennai-2.

... Respondents

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W.P.No.40903 & 40904 of 2005

G.M.R. Power Corporation (Pvt) Limited
Pullianthope High Road, Basin Bridge
Chennai-12 represented by its Associate Vice
President Mr.I.Venkataramana

... Petitioner
in writ both Petitions

vs

1. Union of India represented by Ministry
of Finance, Department of Revenue,
North Block, New Delhi.

2. The Deputy Commissioner of Central Excise
"B" Division, Chennai I Commissionerate
No.317, Anna Salai, Chennai-18.

3. The Commissioner of Central Excise
Chennai III Commissionerate
26/1 (121) Mahatma Gandhi Road
Nungambakkam, Chennai-34.

4. The Chief Commissioner of Central Excise
Chennai I Commissionerate
26/1 (121) Mahatma Gandhi Road
Nungambakkam, Chennai-34.

5. Government of Tamil Nadu represented
by Secretary to Government,
Energy Department, Fort St. George,
Chennai-9.

6. Tamil Nadu Electricity Board represented
by its Chairman, 800, Anna Salai,
Chennai-2.

.. Respondents
in both petitions.

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For appellant in WP 45294/2002 40903 & 40904 :: Dr. Mr.Abhishek Singhvi Senior counsel for for M/s R. Raghavan and R.Venkatavaradhan

For appellants in WP 40902 of 2005 :: Mr.Arvind P.Datar senior counsel for for M/s R. Raghavan and R.Venkatavaradhan

For Respondents 1 to 3 in WP.45294/05 :: Mr.V.T.Gopalan, Additional Solicitor General assisted by Mr.K.Ramakrishna Reddy.

For respondent No.6 in WP 40902 No.4 in WP 45294 No.5 in WP 40903 & 40904/2002 :: Mr.Raja Kalifulla Govt.Pleader assisted by Mr.V.R.Thangavelu Govt. Advocate

For 5th respondent in WP 45294/2002 :: Mr.C. Ramesh

For 7th respondent in WP 40902 and 6th respondent in 40903 & 40904 : Mr. S.N.Kirubanandam

Writ Petition No.45294/2002 filed under Article 226 of the Constitution of India praying this Court to issue a writ of prohibition, prohibiting the respondents 1 to 3 from proceeding with the SCN No.Nil dated "Nil" (received on 2nd December,2002) demanding excise duty of Rs.20,80,69,750.24 for quantity of 1,37,489.557 metric tons of Low Sulphur Heavy Stock (LSHS) procured in terms of Annexure I during the period July,2001 to August 2002.

Writ Petition No.40902/2005 filed under Article 226 of the Constitution of India praying this Court to issue a writ of prohibition, prohibiting the respondents 2 to 5 from proceeding with the show cause notice No.13/2003 dated 4.4.2003 of the 3rd respondent seeking to demand duty of Rs.41,86,70,124/-[Rupees Forty One Crores Eighty Six lakhs seventy thousand one hundred and twenty four only]

Writ Petition No.40903/2005 filed under Article 226 of the Constitution of India praying this Court to issue a writ of prohibition, prohibiting the respondents 2 to 4 from proceeding with the show cause notice No.4/2003 dated 5.11.2003 of the 3rd respondent

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seeking to demand duty of Rs.14,42,37,805/- [Rupees Fourteen Crores forty two lakhs thirty seven thousand eight hundred and five only]

Writ Petition No.40904/2005 filed under Article 226 of the Constitution of India praying this Court to issue a writ of prohibition, prohibiting the respondents 2 to 4 from proceeding with the show cause notice No.3/2003 dated 24.9.2003 of the 3rd respondent seeking to demand duty of Rs.138,32,96,154/- [Rupees one hundred thirty eight Crores thirty two lakhs ninety six thousand one hundred and fifty four only]

COMMON ORDER

(COMMON ORDER THE COURT WAS MADE BY THE HONOURABLE THE CHIEF JUSTICE)

Writ Petition No. 45294 of 2002 is filed by Madurai Power Corporation (Pvt.) Limited. The other writ petitions are filed by different petitioners. But, since the issues involved in all the writ petitions are identical all these writ petitions have been heard together and are being disposed of by this common order.

2. Madurai Power Corporation (Pvt.) Ltd., i.e., petitioner in W.P.No. 45294 of 2002 is engaged in generation of electricity through its generating station situate at Paravai Village, Madurai. The company requires Low Sulphur Heavy Stock (LSHS) for using the same as the primary fuel in the generation of electricity. Notification No.3/2001 came to be issued under Section 5-A(1) of the Central Excise Act, 1944 whereby Low Sulphur Heavy Stock (LSHS) and Furnace Oil (FO) were exempted from excise duty for the use of power generation by the electricity undertakings owned by or controlled by the Central Government, or any State Government or any State Electricity Board or any Local Authority or a person licensed under Part II of Indian Electricity Act, 1910, to supply electrical energy or a person who has obtained sanction under Section 28 of Indian Electricity Act, 1910, to engage in the business of supplying electrical energy, except those who produce electrical energy not for sale, but produce it for their own consumption. The petitioner company applied for exemption from duty under the said Notification and a Registration Certificate was issued by the Competent Authority for procurement of LSHS at concessional duty for generating electricity in favour of the petitioner vide Registration No. AACCM7661 CX M0001 (RC No.1/2001) dated 11.05.2001 and 18.5.2001. The Competent Authority thereafter issued Annexure-I certificate in favour of the petitioner allowing the petitioner to remove the goods at concessional duty on execution of B-8 security bond and on furnishing a bank guarantee. Based on this Annexure-I certificate, the petitioner has been procuring LSHS without payment of duty from various installations of Indian Oil Corporation Limited.

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3. A show cause notice dated 07.02.2002 was issued to the petitioner company by the Assistant Commissioner of Central Excise, Madurai-I Division, Madurai asking the company to show cause as to why Annexure-I certificate dated 30.08.2001 (as amended on 30.12.2001) issued to the company for procurement of LSHS should not be cancelled and as to why the exemption granted under Notification No.3/2001 should not be denied to the company as the company is not eligible for exemption under Notification No.3/2001. The petitioner submitted a reply dated 18.02.2002 contending inter alia that as the petitioner by virtue of Section 26-A of the Electricity Supply Act, 1948 has satisfied all the conditions for issue of license under Part-II of the Indian Electricity Act, 1910, it must be deemed to possess a license under Part-II of the Indian Electricity Act, 1910 without the same being issued and that the company being under the control of the Tamil Nadu State Electricity Board is entitled to claim exemption. A personal hearing was granted by the Assistant Commissioner of Central Excise wherein the petitioner company through its counsel made submissions. However, no orders were passed in respect of these proceedings initiated vide show cause notice dated 2.7.2002. Thereafter, the Assistant Commissioner of Central Excise, Madurai-I Division, Madurai issued another notice dated 15.4.2002 on the same ground requiring the petitioner company to show cause as to why Annexure -I issued in terms of Notification No.3/2001 should not be cancelled. The petitioner company filed reply to the said notice, and the said proceedings remain pending in the files of the respondent. The Deputy Commissioner of Central Excise issued yet another show cause notice dated nil (received on 2.12.2002) calling upon the petitioner to show cause as to why the excise duty amounting to Rs.20,80,69,750/- (Rupees twenty crores eighty lakhs sixty nine thousand and seven hundred fifty only) payable on the LSHS procured by the petitioner, as detailed in Annexure-B to show cause notice, should not be demanded from the petitioner company under the provisio to sub-section (1) of Section11-A of the Central Excise Act, 1944 for the period from July 2001 to August 2002. The legality and propriety of the show cause notice is questioned by the petitioner company in the present writ petition on the ground that the same is arbitrary, illegal and wholly without jurisdiction. It is also alleged by the petitioner that the notice has been issued in mala fide exercise of power only with a purpose of meeting the revenue target on the basis of totally absurd view of the legal position especially when no decision has been taken on the earlier show cause notices issued to the petitioner.

4. W.P.Nos. 40902 of 2005, 40903 and 40904 of 2005 are filed by Samalpatti Power Company (Pvt) Limited and GMR Power Corporation (Pvt) Limited respectively. Both the companies are involved in generation of electricity and have been issued Registration Certificates for procurement of LSHS for generation of electricity on

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concessional duty. Based on the Annexure-I certificate, the companies have been procuring LSHS without payment duty from various installations of Bharat Petroleum Corporation Limited. Similar notices have been issued to the petitioners under provisio to sub-section (1) of Section 11-A of the Central Excise Act, 1944 to show cause as to why the excise duty payable on LSHS procured by the petitioner, as detailed in Annexure-B to show cause notice, should not be demanded from the petitioners. In W.P.No. 40902 of 2005, the petitioner has challenged the show cause notice demanding payment of excise duty of Rs. 41,86, 70,124 (Rupees Forty one crores eighty six lakhs seventy thousand and one hundred and twenty four only) for the period from December, 2000 to February, 2003. In W.P.Nos.40903 and 40904 of 2005, the challenge is to show cause notices, one for the period from September, 1998 to September, 2002 for demanding payment of excise duty of Rs. 14,42,37,805 (Rupees fourteen crores forty two lakhs thirty seven thousand and eight hundred and five only) and another for the period from October, 2002 to February, 2003 for demanding payment of excise duty of Rs. 14,42,37, 805 (Rupees fourteen crores forty two lakhs thirty seven thousand and eight hundred and five only).

5. In order to appreciate the controversy raised, it would be necessary to take note of the factual background. In view of the large gap between the demand and supply position of electricity and State Electricity Boards not being able to meet the requirements of industries and general public, the Government of India in consultation with the State Electricity Boards decided to allow Independent Power Producers (IPPs for short) to enter power generation area under the control of the respective State Electricity Boards and in this regard, to enter into Power Purchase Agreement (PPA for short) in terms of which supply the entire power so generated to the grids of State Electricity Boards. Under Section 43-A of the Electricity Supply Act, 1948, the tariff structure of the IPPs is governed by the Central Government Notification. The Ministry of Power, Government of India, accordingly issued Notification dated 30.3.1992 stipulating various terms which would govern the PPA to be entered into between power generating companies and the State Electricity Boards. The PPAs entered into between the petitioners and the Tamil Nadu State Electricity Board are as per the terms of the said Notification dated 30.03.1992 and the entire electricity generated by the petitioners is to be supplied to the Tamil Nadu State Electricity Board (for short TNSEB).

6. The case of the petitioners is that the generation of electricity by the petitioner companies is fully controlled by the TNSEB, inasmuch as the petitioner companies cannot generate electricity, except in terms of the PPAs and in terms of Section 18 of the Electricity Supply Act, 1948, the statutory control regarding operations of generating stations vests with the respective State

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Electricity Boards. Even the location of the petitioner companies is stipulated by the TNSEB. The projects of the petitioner companies have been approved by the TNSEB and in terms of the PPAs, the Government of Tamil Nadu has guaranteed to the companies the dues of the TNSEB under the said projects. The maintenance and unit wise closure of the units are controlled by the TNSEB and there is no permission to the petitioners to generate and supply to others, except TNSEB. As per the PPAs at the expiry of the PPA period, the petitioners' generating companies shall be made over only to the TNSEB. The petitioners, therefore, contend that they are under the control of the TNSEB and can legitimately claim exemption under the relevant notification. It is, further, contended by the petitioners that by virtue of Section 26-A of the Electricity Supply Act, 1948 they possess license under Part-II of the Indian Electricity Act, 1910 and the same is a "deemed license". It is, further, urged by the petitioners that the respondents are attempting to deny the exemption and when once the petitioner companies have been declared as licensees by the Government of Tamil Nadu and the State Electricity Board, the excise authorities cannot treat it as a non-license and deny the benefit. It is urged that none of the requirements of proviso to Section 11-A are satisfied in the present case, and thus, the benefit of longer period of limitation under the proviso is not available to the Department. In any event, the recourse to Section 11-A is not permissible unless Annexure-I certificate and the exemption are set aside and cancelled by the appropriate authority in accordance with the provisions of the Central Excise Act.

7. The respondents have filed separate counters to the writ petitions. The sum and substance of the defence is that the petitioner companies are allowed to remove the procured electricity without payment of duty based on the respective claims and the "bond undertakings" given by the petitioner companies to the effect that they will observe all the provisions of the Central Excise Rules and all such amendments there to as may be issued from time to time, so far as they relate to the use of excisable goods for industrial purpose without payment of the whole of duty, and the registration Certificates have been issued to facilitate the smooth functioning of the power generating units of the petitioners. However, consequent to the enquiries conducted and verifications made with reference to the status of the Units and the eligibility of the petitioner companies to the claim for exemption under Notification No.3/2001 dated 1.3.2001, as provided under Section 11 A of Central Excise Act, 1944 and in consonance with the principles of natural justice, the petitioners were issued with relevant notices to show cause as to why the Registration Certificates issued to them under the Rules should not be cancelled. The petitioner companies are not "deemed licensees" by virtue of Section 26-A of the Electricity Supply Act, 1948. On the other hand, a careful reading of the said section would disclose that the petitioner companies are exempted from obtaining license from the

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authority appointed under Indian Electricity Act, 1910 by virtue of having drawn the authority directly from another Act of the Parliament namely Electricity Supply Act, 1948. Therefore, it cannot be contended that the petitioner companies are "deemed licensees" under the State Electricity Board. It is, further, contended that the petitioner companies are not owned by the Central Government/State Government/ Local Authority/State Electricity Board. The petitioners are private limited companies. Neither the Central Government/State Government nor any Local Authority or Tamil Nadu State Electricity Board has any shareholding in the petitioner companies and therefore, it does not have any control over the companies as such and in terms of PPAs the petitioners are being merely regulated by the TNSEB in respect of power supply to TNSEB. It is contended that the word "controlled by" is preceded by the word "owned by" in the said notification and it has to be construed that the word "controlled" must have a similar meaning to that of the word "owned". Hence, the petitioner companies cannot be said to be controlled by TNSEB. On the question of limitation, it is submitted that the question whether the extended period of five years under the proviso to Section 11-A could be invoked has to be first determined by the authority and the authority cannot be said to be totally lacking in jurisdiction even to embark upon the enquiry or investigation of this issue so as to warrant interference in writ jurisdiction even at show cause notice stage. It is submitted that the impugned notices have been issued in terms of Section 11-A of the Act and there is no illegality in issuing the impugned notices. Hence, the writ petitions are not maintainable.

8. Mr.Abishek Singhvi and Mr.Arvind P.Datar, learned senior counsel appearing for the respective writ petitioners submitted that in all the cases permission to purchase goods without payment of duty was granted after satisfaction of the competent authority and a specific approval was granted under the Central Excise (Removal of Goods at concessional rate of duty for manufacture of excisable goods) Rules, 2001 (for short '2001 Rules'). Learned counsel submitted that once the order is passed by the competent authority under 2001 Rules that could be rectified only through the appeal mechanism provided under Section 35E(2) of the Central Excise Act and unless the order is set aside under Section 35E(2) no recovery could be made under Section 11-A of the Central Excise Act. According to the learned counsel, Section 35E(2) covers situations where decisions or orders are granted after application of mind and these will be valid and binding till it is set aside in appeal. By invoking Section 11-A, the department is attempting to do indirectly what it cannot do directly and since, the remedy under Section 35E is barred by limitation, it now seeks to invoke the larger period under Section11A.

9. In reply, learned Additional Solicitor General appearing for the respondents submitted that the impugned show cause notices are

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perfectly in conformity with the provisions of Section 11-A of the Central Excise Act and there is no illegality in the issue of such show cause notices and there is no need to refer to Section 35E(2) of the said Act. He submitted that after the amendment to Section 11-A which was necessitated on account of the judgment of the Constitution Bench in Collector of Central Excise, Baroda vs Cotspun Limited, 1999 (7) SCC 633 the power has been given to the authorities to issue show cause notices, despite the fact that non-levy or non-payment or short levy was short levy was on the basis of any approval, acceptance or assessment obviating the need to have the earlier order set aside before issuing the show cause notices. Therefore, the terms of Section 11A, as it now stands, will be a complete answer to the petitioners' objection and the validity of Section 11A has not been questioned. He submitted that even otherwise Section 11A and Section 35E (2) are two separate fields and are intended for different purposes. The object of Section 11A is to enable recovery of dues for the period during which the assessee had cleared the goods on the basis of the approved classification list/price list or on the basis of any approval/acceptance or assessment. As far as Annexure-I certificate is concerned, he submitted that the authorities are required to find out as to whether the same is in the prescribed form, requisite bond had been given and declarations and undertakings were made. The self-assessment procedure and the Annexure-I certificate containing the undertakings to comply with the conditions of exemption notification and bond taken towards the value of the duty for such compliance normally excludes the procedure for making the assessment by the authorities and in any event, according to him, as per the terms of Section 11, it is open to the authorities even in the face of any approval, acceptance or assessment relating to the rate of duty to issue the impugned show cause notice.

10. It is well settled that under Article 226 of the Constitution of India, this Court having regard to the facts of the case has a discretion to entertain or not to entertain a writ petition. But, the Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, this Court would not normally exercise its jurisdiction. But the alternative remedy will not operate as a bar in at least three contingencies namely, where a writ petition has been filed for enforcement of any of the fundamental rights or where there has been violation of principles of natural justice or where the order or proceeding are wholly without jurisdiction or the vires of the Act is challenged (see Calcutta Discount Com. Ltd., vs ITO, Companies Distt.., AIR 1961 SC 372), East India Commercial Company Limited, Calcutta vs Collector of Customs, Calcutta, 1983 ELT 1342(SC), Whirpool Corporation vs Registrar of Trade Marks, Mumbai and others, 1998 (8) SCC 1.). Thus, the question to be examined in these proceedings is as to whether the impugned show cause notices issued under Section 11- A of the Act are wholly without jurisdiction.

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11. The submission of the learned senior counsel appearing for the petitioners is that once an order is passed by the adjudicating authority under 2001 Rules that could be rectified only through an appeal mechanism provided under Section 35E(2) of the Central Excise Act, and it is not permissible for the department to invoke Section 11-A. The amendment of Section 11-A does not contain an non-obstante clause nor the amended Section 11A over-ride or nullify Section 35E. Section 35E has to be read harmoniously with Section 11A. If there is no case of approval, acceptance or assessment, the Central Excise Officer can straightaway invoke Section 11A and demand duty for one year/five years, as the case may be. Section 11A does not over ride Section 35E and both sections have to co-exist and read harmoniously. It is only where short-levy, short payment, non-levy or non-payment occurs either on account of the approvals relating to rate of duty or valuation, demands can be sustained under Section 11A itself without having recourse to Section 35E. So far as 2001 Rules are concerned, recovery can be made if there is misuse of goods and does not concern with the person who has purchased the goods.

12. In Collector of Central Excise, Baroda vs Cotspun Limited (supra), the Constitution Bench of the Supreme Court held as follows: - (SCC page 637 paras.14 & 15)

> " The levy of excise duty on the basis of an approved classification list is the correct levy, at least until such time as to the correctness of the approval is questioned by the issuance to the assessee of a show-cause notice. It is only when the correctness of the approval is challenged that an approved classification list ceases to be such.
>
> The levy of excise duty on the basis of an approved classification list is not a short levy. Differential duty cannot be recovered on the ground that it is a short levy. Rule 10 has then no application.

13. Parliament has amended Section 11A of the Central Excise Act by Finance Act, 2000 (10of 2000) with effect from 17.11.1980, and the amended Section 11A reads as follows: -

> " 11A. Recovery of duties not levied or not paid or short-levied or short paid or erroneously refunded: (1) When any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of

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duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why, he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with an intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect as if, for thw words "one year", the words "five years" were substituted.

Explanation: Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be."

14. The Statement of Objects and Reasons for amending Section 11-A reads thus: –

"Clause 106 seeks to validate certain action taken under Section 11-A of the Central Excise Act with retrospective effect from 17-11-1980, so as to prescribe that the notices issued under the said section for non-recovery or short-recovery or erroneous refund of duties for a period of six months or five years in certain situations will prevail notwithstanding any approval, acceptance or assessment of duty under the provisions of the Central Excise Rules. The clause also seeks to validate actions taken in the past on this basis in conformity with the legislative intention. This amendment has become necessary to overcome certain judicial pronouncements."

15. Further, Section 110 of the Finance Act validating actions taken under Section 11-A provides as under:

"110. (1) Any notice issued or served on any person under the provisions of Section 11-A of the Central Excise Act during the period commencing on

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and from the 17th day of November, 1980 and ending on the date on which the Finance Act, 2000 receives the assent of the President (hereinafter referred to as the said period) demanding duty on account of non-payment, short payment, non-levy, short-levy or erroneous refund within a period of six months or five years, as the case may be, from the relevant date as defined in clause (ii) of sub-section (3) of that section shall be deemed to be and to always have been, for all purposes, validly and effectively issued or served under that section, notwithstanding any approval, acceptance or assessment relating to the rate of duty on or value of, the excisable goods by any Central Excise Officer under any other provision of the Central Excise Act or the rules made thereunder.

(2) Any action taken or anything done or purporting to have been taken or done under Section 11-A of the Central Excise Act at any time during the said period shall be deemed to be and to have always been, for all purposes, as validly and effectively taken or done as if sub-section (1) had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority,—

(a) all duties of excise levied, assessed or collected during the period specified in sub-section (1) on any excisable goods under the Central Excise Act, shall be deemed to be and shall be deemed to always have been, as validly levied, assessed or collected as if sub-section (1) had been in force at all material times;

(b) no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for the refund of, and no enforcement shall be made by any court of any decree or order directing the refund of any such duties of excise which have been collected and which would have been validly collected if sub-section (1) had been in force at all material times;

(c) recovery shall be made of all such duties of excise which have not been collected or, as the case may be, which have been refunded but which

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would have been collected or, as the case may be, would not have been refunded, if sub-section (1) had been in force at all material times.

Explanation:—For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

16. The scope of the amended Section 11A was considered by a three-Judge Bench of the Supreme Court in ITW Signode India Ltd vs Collector of Central Excise, 2003 (158) ELT 403 (SC). The Court held as follows: -

"48. The Statements of Objects and Reasons for enacting a statute can be read for a limited purpose. In Cotspun (supra) this Court held that Rule 10 does not deal with classification list or relate to reopening of the approved classification list. According to the Constitution Bench, the same is exclusively provided by Rule 173B.

49. Section 11A deals with a case when inter alia excise duty has been levided or has been, short-levied or short-paid. The word "such" occuring after the words"whether or not" refers to non-levy,non-payment, short-levy or short-payment or erroneous refund. It is, therefore, not correct to contend that the word "such" indicates only such short-levy which has been held to be non-existent in Cotspun having regard to Rule 173B. Such short-levy or non-levy may be on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods. Thus, any approval made in terms of Rule 10, in the event, any mistake therein is detected, would also come within the purview of the expression "such short-levy or short-payment". Such notice is to be served on the person chargeable with the duty which inter alia has been short-levy or short-paid.

51.The procedure laid down under Rule 173B of the Rules has specifically been included in the Act. Furthermore, by reason of the amended Act a provision has been made for reopening the approved classification lists. It is a procedural provision in terms whereof statutory authorities are required to determine as to whether the earlier classification was correctly done or not. The said

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> authority upon giving an opportunity of hearing the parties may come to the conclusion that decision on the approval granted need not be reopened and even if the same is reopened, the reasons therefor are to be stated. As the provision of Section 11A is a recovery provision as regards non-levy or non-paid or short-levy or short-paid or erroneously refunded duties by reason of the said amendment the Parliament had merely provided that an approval on the basis of a classification list inter alia in case of a short-levy can be recovered if a finding is arrived at that the goods had undergone a short-levy. For the aforementioned purpose, Clause 110 of the Finance Act, validating actions taken under Section11A can be taken into consideration whereby and whereunder a legal friction is created.
>
> 54. Cotspun (supra) was decided when the matters relating to classification, approval thereof as also short-levy or upon detection of a mistake where governed by the rules. Rule 10 and Rule 173B were to be read in conjunction with each other and the Constitution Bench merely followed the said principle of interpretation of statute. A different situation has arisen now having regard to the fact that not only the substantive provision dealing with the consequence of non-levy, non-payment or short-levy or short-payment or erroneous refund but also has laid down the procedure therefor.

The Bench held that Section 11A, as amended, of the Act is a valid piece of legislation.

17. The question is whether by virtue of amendment to Section 11A the procedure prescribed under Section 35E is rendered nugatory.

18. Section 35 of the Central Excise Act provides appeal mechanism for the assessee. Section 35E confers power of Committee of Chief Commissioner of Central Excise or Commissioner of Central Excise to pass certain orders. Section 35 E(2) empowers the Commissioner of Central Excise to call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may by order, direct such authority to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order. The question is whether the amending Section 11A has superseded the mechanism provided under Section35E giving power to the Competent Authority to reopen the

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case. After amendment, recovery can be made even if there is non-levy, non-payment or short-levy or short-payment or erroneous refund on the basis of any approval, acceptance or assessment. The basic period is increased from six months to one year and the larger period continues to be five years for fraud, suppression, wilful misstatement etc. The intention of the Legislature was that recovery can be enforced for a period of one year or 5 years as the case may be notwithstanding any approval, acceptance or assessment of duty under the provisions by the Assessing Officer. It is well settled that the statute has to be read as a whole to find out the real intention of the Legislature. In SULTANA BEGUM VS PREM CHAND (1977 (1) SCC373) two Judge Bench of the Supreme Court held as follows:

> "On a conspectus of the case-law indicated above, the following principles are clearly discernible:
>
> (1) It is the duty of the Courts to avoid a head-on clash between two sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.
>
> (2) The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them;
>
> (3) It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of "harmonious construction".
>
> (4) The courts have also to keep in mind that an interpretation which reduces one of the provisions a "dead letter" or "useless lumber" is not harmonious construction.
>
> (5) To harmonise is not to destroy any statutory provision or to render it otiose"

19. In COLLECTOR OF CENTRAL EXCISE, KANPUR VS FLOCK(INDIA) LTD (2000(120) ELT 285(SC) the consequence of non-challenge of an appealable order passed under Central Excise and Salt Act, 1944 arose for determination. The question in that case was where the Assistant Collector of Central Excise passes an order classifying a product under a particular tariff item and the said order though appealable is not challenged by the assessee in appeal, whether in the application for refund of the duty paid the assessee is entitled to question the order of the Assistant Collector as erroneous. The Court held that Section 35A lays down the procedure to be followed

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in disposal of the appeal and Section 35B(1)(b) makes an order passed by the Collector (Appeals) under Section 35A appealable to the appellate tribunal. It was held that right of appeal is creature of the statute and it is a substantive right.

20. This issue was again considered by another two Judge Bench in Priya Blue Industries Ltd., V. Commissioner of Customs (Preventive), 2004 (172) ELT 145 (SC) wherein the Court following the decision in Flock (India)'s case observed that once an order of assessment is passed the duty would be payable as per the order and unless the order has been reviewed under Section 28 and/or modified in an appeal that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sin in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order.

21. In ASIAN PAINTS (INDIA) LTD VS COLLECTOR OF CENTRAL EXCISE,BOMBAY (2002 (9) SCC 515) the Supreme Court has observed that Sections 35-E and 11-A operate in two different fields and are invoked for different purposes. Different time limits are, therefore, set out therein. Therefore, the Court rejected the contention that recovery of excise duty cannot be made pursuant to an appeal filed after invoking the provisions of Section 35-E, if the time limit provided in Section 11-A has expired. It was observed that to so read the provisions, would be to render Section 35-E virtually ineffective, which would be impermissible.

22. In COMMERCIAL TAXATION OFFICER VS RAJASTHAN TAXCHEM LITD (2007(2) SCALE 120), the respondent was engaged in the business of manufacture of polyester yarn and for the said purpose, it purchased diesel and used it for manufacturing electricity by D.G.-sets. The respondent claimed a benefit under Section 10(1) of Rajasthan Sales Tax Act, 1994 claiming that diesel purchased is a raw material for the manufacture of the ultimate final product-polyester yarn. Under the notification issued under Section 10(1) of the said Act, purchase of raw material for manufacture of final product is entitled to a concessional rate of tax at 3% instead of the normal tax of 4%. The appellant contended that diesel is not a raw material for the manufacture of polyester yarn and therefore, eligible to tax at 4%. The Court noted that before purchasing any goods as raw material, it is necessary for the purchaser to apply to the Assessing Officer concerned for issuance of registration certificate specifically mentioning such items as raw material. In that case the respondent accordingly approached the appellant who granted the registration certificate after considering all the aspects of the matter and taking a conscious decision. The Court observed that it is not the case of the appellant that at the time of grant of such registration certificate all facts were not placed before the appellant and that

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there is concealment of any material facts and in fact the registration certificate so issued has been in effect during the concerned period and has not been cancelled, revoked or modified. The Court referred to the decision of a Division Bench of Rajasthan High Court in COMMERCIAL TAXES OFFICER VS HINDUSTAN RADIATOR (1962 STC 374) wherein the Division Bench held that "We agree with the view taken in Bowen Press case 2 that the entry in the registration certificate of the assessee dealer that certain articles are raw material for the manufacture of goods is conclusive and in face of the entry in the registration certificate, it is not open to the assessing authority to contend that though a particular article has been mentioned in the registration certificate as raw material, is not in fact a raw material within the meaning of Section 2(mm) of the Act and if any cancellation or modification is sought in respect of that entry, then, it is only by following the procedure laid down under the Act and the Rules framed thereunder that entry can be cancelled or modified

23. In our opinion, there is no nexus between Section 11A and Section 35E. Section 11A does not indicate that the legislature intended to override Section 35E. Both sections have to be read harmoniously. In the present case, Annexure-I certificate has been issued in favour of the petitioners from time to time on executing B-8 security bond and on furnishing a bank guarantee. The department has to follow the procedure under Section 35E for setting aside the Annexure-I certificate. Unless, the Annexure-I certificate is cancelled or rejected by the competent authority, by following the procedure under Section 35E, it is not permissible for the respondents to invoke Section 11A of the Act. Therefore, we are of the considered opinion that the issuance of show cause notices are without jurisdiction and is liable to be struck down.

24. As regards, the issue of limitation, the question is whether the benefit of longer period of limitation under the proviso to Section 11A is available to the Department. In order to avail the benefit of longer period of limitation, the department has to establish willful suppression of fact. Proviso to Section 11A reads as under: -

> " Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect , Collector of Central Excise five years"

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25. From the admitted facts of this case, there can be no doubt that none of the requirements of the above quoted proviso is satisfied in the present case to give to the Department the benefit of the larger period of limitation. The removal of the goods was in accordance with the approved classification list and all the material facts were before the authorities concerned, procurement of goods was done after obtaining exemption and as per the notification, all the materials were placed before the authorities concerned. The petitioners are private generating companies and they applied to the authorities disclosing all the facts with necessary particulars as prescribed in the form as per Rules. It is also seen from the records that the Department was aware of the PPAs executed between the petitioners and the Tamil Nadu State Electricity Board. In these circumstances, it is not possible to hold that there was suppression of facts .

26. In M/S PADMINI PRODUCTS LTD VS COLLECTOR OF CENTRAL EXCISE, BANGALLORE (1989 (4) SCC 275) the Supreme Court observed that something positive other than mere inaction or failure on the part of the manufacturer or producer of conscious or deliberate withholding of information when the manufacturer knew, is required to be established before it is saddled with any liability beyond the period of limitation. Suppression of facts is not failure to disclose the legal consequences of a certain provision. The proviso to Section 11 A is clearly not attracted to the facts of the present case. It is settled law that mere change of opinion of the Assessing Officer cannot give rise to a cause of action to invoke the benefit of the extended period of limitation under the proviso to Section 11-A of the Act. Therefore, the impugned notices are barred by limitation.

27. For the foregoing reasons, all the writ petitions are allowed and the impugned show cause notices are quashed. Learned Additional Solicitor General seeks leave to appeal to the Supreme Court which request is granted. No costs. Consequently, connected M.Ps are closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Deputy Commissioner of Central Excise
   Bibikulam, Madurai I Division, Madurai-625 002.

2. The Commissioner of Central Excise
   Bibikulam, Madurai-625 002.

3. The Chief Commissioner of Central Excise
   6/7, ATD Street, Race Course Road,
   Coimbatore 641 018.

4. The Secretary to Government,
   Government of Tamil Nadu
   Energy Department, Fort St. George,
   Chennai-9.

5. The Chairman,
   Tamil Nadu Electricity Board represented
   800, Anna Salai,
   Chennai-2.

6. Union of India represented by Ministry
   of Finance, Department of Revenue,
   North Block, New Delhi.

7. The Assistant Commissioner of Central Excise
   Hosur I Division, No.29, Thalli Road,
   Hosur-635 126.

8. The Additional Director General
   Directorate General of Central Excise Intelligence
   South Zonal Unit, C-3,"C" Wing Rajaji Bhavan
   Besant Nagar, Chennai-90.

9. The Commissioner of Central Excise
   Chennai III Commissionerate
   26/1 (121) Mahatma Gandhi Road
   Nungambakkam, Chennai-34.

10 The Chief Commissioner of Central Excise
   Chennai III Commissionerate
   26/1 (121) Mahatma Gandhi Road
   Nungambakkam, Chennai-34.

11. The Deputy Commissioner of Central Excise,
   "B" Division, Chennai I Commissionerate
   No.317, Anna Salai, Chennai 18.

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12. The Chief Commissioner of Central Excise,
Chennai I Commissionerate,
26/1[121] Mahatma Gandhi Road,
Chennai 34.

+ 5 CCs to Mr.R.Venkatavaradan, Advocate SR Nos.49664, 49434

+ 1 CC to the Government Pleader SR NO 49701

+ 1 CC To Mr.S.N.kirubanandam, Advocate SR NO.49540

+ 1 CC To M/s.P.Buvaneswari, SCCSG, SR NO.50253

+ 1 CC To M/s.K.Ramakrishna Reddy, Advocate SR NO.49473

W.P.Nos.45294 of 2002
and 40902 to 40904 of 2005

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